

Exhibit C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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:
BAIS YAAKOV OF SPRING VALLEY, :
ET AL., :
:
Petitioners, :
:
v. : No. 14-1234, et al.
:
FEDERAL COMMUNICATIONS :
COMMISSION, ET AL., :
:
Respondents. :
:
----- X

Tuesday, November 8, 2016

Washington, D.C.

The above-entitled matter came on for oral argument
pursuant to notice.

BEFORE:

CIRCUIT JUDGES KAVANAUGH AND PILLARD, AND
SENIOR CIRCUIT JUDGE RANDOLPH

APPEARANCES:

ON BEHALF OF THE PETITIONERS:
AYTAN Y. BELLIN, ESQ.
MATTHEW A. BRILL, ESQ.

ON BEHALF OF THE RESPONDENTS:
MATTHEW J. DUNNE, ESQ.

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THE CLERK: Case number 14-1234, et al., Bais
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Communications Commission, et al..

I. OPT-OUT REGULATION

JUDGE KAVANAUGH: Good morning.

ORAL ARGUMENT OF MATTHEW A. BRILL, ESQ.

ON BEHALF OF THE CLASS ACTION

DEFENDANT-PETITIONERS AND INTERVENORS

MR. BRILL: Good morning. May it please the
Court, Matthew Brill for the Class Action Defendant-
Petitioners.

In enacting the TCPA and the Junk Fax Prevention
Act, Congress drew a stark distinction between fax
advertisements that were unsolicited, and faxes sent with
express permission. Congress directed the FCC to impose
detailed rules on the unsolicited faxes, but provided no
authority at all with respect to solicited faxes. The FCC's
order obliterates that clear distinction, and thus runs
afoul of the text and structure of Section 227(b)

JUDGE PILLARD: Mr. Brill, can you describe how
typically fax advertisers obtain, or how their
advertisements are solicited? How do people, if I'm an
owner of a fax machine and I want to solicit advertisements
how do I typically do that?

1 MR. BRILL: Your Honor, I don't know that there's
2 a typical method, because we have within this record very
3 large businesses, very small businesses, we have oral
4 consent that's solicited on the telephone, I might call you
5 up and said I'd like to send you, this was effectively the
6 *Nack v. Walburg* case, Walburg was an independent publishers,
7 a small business, and would obtain one-time permission to
8 send a fax, and I believe would do so via telephone and call
9 and ask the recipient for that consent, or obtain it in
10 writing. My client and a generic drug distributor would
11 invariably obtain that in writing. But the statute --

12 JUDGE PILLARD: In writing, how? Tell me a little
13 bit more how that goes. They write me a letter and they say
14 if you want my fax ads call me? They say send me a letter,
15 I'm guessing not.

16 MR. BRILL: So, Anda had a niche in the market in
17 dealing with mom and pop pharmacies that typically didn't
18 want to use computers for e-mail, they might have a single
19 computer to use for Medicaid, Medicare look-ups, and would
20 expressly prefer faxes when the prices of generic drugs
21 would change, and they would change almost daily. And so,
22 at some point in establishing a relationship with a pharmacy
23 customer, the pharmacy would be asked for express consent to
24 deliver pricing information by fax. So, you know, typically
25 that would be part of establishing the business relationship

1 in the first instance.

2 And we know from the statute that Congress was
3 trying to solve a very narrow problem with this opt-out
4 provision. As a general matter, unsolicited faxes are
5 prohibited, but Congress created in the Junk Fax Prevention
6 Act a narrow carve-out from that prohibition to allow an
7 unsolicited fax to be sent where the sender has an
8 established business relationship with the recipient, and
9 the problem with that was that having a business
10 relationship simply doesn't tell us one way or the other
11 whether the recipient wants to receive a fax, it's at best
12 inferred or presumed consent. And recognizing that problem
13 that arises in the absence of express consent Congress tried
14 to solve the problem in that narrow instance by requiring an
15 explicit opt-out notice on the first page of the fax. But
16 Congress didn't see a need to require those notices on faxes
17 that were sent with express permission, but the whole point
18 of having somebody opt-in is that it obviates the need for
19 them to be told how to communicate their preferences. And
20 we know this limitation because the text and structure of
21 the statute are clear, Section 227(b)(2) contains the
22 directive to the FCC to prescribe regulations.

23 JUDGE RANDOLPH: What if the fortunate recipient
24 says yes, you can send me a fax, can you keep sending faxes
25 after that?

1 MR. BRILL: No, Your Honor. I mean, it's up to
2 the recipient to define the scope of his or her consent, and
3 there can be a number of instances where a recipient --

4 JUDGE RANDOLPH: Well, the telephone solicitation
5 point that you made triggers that, a hypothetical in my
6 mind, if the solicitor on the telephone says may we send you
7 a fax with an advertisement on it, and the person says yes,
8 what is that person authorizing, one fax?

9 MR. BRILL: Well, I think, you know, there often
10 are factual disputes that arise in these court cases about
11 the scope of the consent, and that's really not an issue
12 here because we're dealing with cases, for example, the *Nack*
13 *v. Walburg* case, where both parties agreed there was a one-
14 time request for consent and it was granted. And in that
15 instance it's crystal clear --

16 JUDGE RANDOLPH: But I agree with you that, I
17 mean, it seems to me there would be a good many factual
18 disputes, particularly if the consent was oral on the
19 telephone, that one way of doing away with any problems is
20 simply require opt-out on every fax that's sent.

21 MR. BRILL: And Judge Randolph, I think that goes
22 to the question whether there might have been a sensible
23 policy reason to require that.

24 J3: I agree.

25 MR. BRILL: And that is a judgment that Congress

1 didn't make in this instance. And Congress sought to
2 balance here competing interests, those legitimate consumer
3 protection interests were undoubtedly part of this statute,
4 but so too were the legitimate business interests. And
5 recall that this Act, this Junk Fax Prevention Act, actually
6 expanded the rights of senders of faxes after the FCC had
7 curtailed them. The FCC had initially established the
8 established business relationship carve-out and then took it
9 away. Congress gave it back because it wanted to allow
10 faxes when they were pursuant to either express consent,
11 which is wholly unregulated under the statute, or when
12 you've gone through the specified procedures to provide the
13 opt-out notice.

14 JUDGE PILLARD: Well, Mr. Brill, you say express
15 consent, which is wholly unregulated, but you are, you've
16 also conceded I think correctly that there are often factual
17 disputes about the scope and nature of express consent.
18 Given that, putting aside the Junk Fax Act, before that was
19 enacted is it your position that the FCC lacked authority to
20 regulate, to help define what counts as consented to fax,
21 and what counts as unsolicited fax?

22 MR. BRILL: No, Your Honor, we're not arguing that
23 they had no authority to define those parameters. But I
24 think the critical fact is that's not what the FCC did here.
25 The FCC could have said we're going to define what it means

1 to receive an express invitation, or express permission, or
2 to answer Judge Randolph's question we're going to specify
3 that there must be some specific grant of authority for an
4 indefinite grant of permission, not a one-time grant of
5 permission, and I think they probably could have done that
6 depending on how they justified it. But that's plainly not
7 what the Commission did. At page 22 of their brief they
8 concede that this opt-out notice they're applying to faxes
9 that are sent with express consent, they're not arguing that
10 there's some factual uncertainty, and it's easiest to see in
11 the case --

12 JUDGE PILLARD: Aren't they? I mean, over time
13 the question is if I say sure, send it to me, and as I
14 understand the way the industry works, once you get someone
15 filling out their fax number somewhere there's an aspect of
16 implication that that's consent, and that, and then faxes
17 start flowing, and at some point people say well, I signed
18 up but not for the rest of my life, I want to get out of
19 this, and the consent stops. And the question is how can
20 that be communicated? So, isn't that part of the problem
21 that, in fact the problem that they're looking at?

22 MR. BRILL: I don't think the Commission said in
23 its order or its brief that there is uncertainty at the
24 front end whether there's consent. They're saying instead
25 something slightly different that sometimes recipients don't

1 know how to revoke their consent having given it. And
2 again, the problem is Congress struck a particular balance
3 and said we want these opt-out notices, which take up space,
4 and most importantly subject senders to massive liability,
5 only for unsolicited faxes. So, the Commission could have
6 defined more tightly what it means to grant permission.
7 What it couldn't do is if we consult the legislative history
8 Congress said we're concerned about unsuspecting or
9 uninformed businesses being subject to unforeseen and costly
10 litigation, and that's precisely what the Commission has
11 done here.

12 The *Walburg* case, again, is a good example, there
13 there was no dispute, there was this hypothetical concern
14 about consent, not consent wasn't present, both parties
15 agreed there was a single request for a fax, it was
16 consented to; when it was sent with an allegedly deficient
17 opt-out notice the result was a lawsuit seeking up to \$48
18 million for the transmission of a single fax. And that is a
19 wildly disproportionate result that is exactly what Congress
20 was concerned about.

21 JUDGE KAVANAUGH: You argue that Congress not only
22 did not do this and provide the authority, but they could
23 not do it under the First Amendment?

24 MR. BRILL: We do, Your Honor, and we think the
25 statute is clear, and under the *Chevron* principles that are

1 imported through our APA argument, the 16 references in
2 the --

3 JUDGE KAVANAUGH: When you -- I understand that,
4 but just on the First Amendment, you agree that Congress, or
5 do you not, has authority to require the opt-out notice on
6 the established business relationship category?

7 MR. BRILL: We do, Your Honor, because those are
8 unsolicited faxes that there's no evidence that they're
9 wanted. And the problem with applying this rule to faxes
10 sent with express consent is that it's massively overbroad.
11 Again, subjecting a business to \$48 million in damages for
12 complying with a request is just what Congress was worried
13 about, and it doesn't legitimately serve any governmental
14 interests. The single request for a fax is the best
15 example, in that case where we have a consenting --

16 JUDGE KAVANAUGH: If there were lighter penalties
17 would the First Amendment issue go away? Is that the nub of
18 the First Amendment --

19 MR. BRILL: I don't think so, Your Honor, it just
20 emphasizes just how massively disproportionate these burdens
21 are. I mean, what Congress, what the Commission could have
22 done is something far narrower, importantly, Section 227(d)
23 unlike (b) applies to all faxes, whether solicited or
24 unsolicited, that's the provision that requires you to put
25 at the top of the fax the sender's identity, the time and

1 date stamp, and the outbound, the fax number from which it's
2 sent. The Commission could have said using authority that
3 applies to all faxes, that all faxes need to have a number
4 that can be called back for an opt-out, and that wouldn't
5 have given rise to a private right of action, because only
6 violation of regulations prescribed under 227(b) give rise
7 to these lawsuits. So, it would have been narrower in the
8 sense that it wouldn't have compelled speech on faxes that
9 Congress tried to carve out, and it wouldn't have subjected
10 senders to these massive penalties. I think --

11 JUDGE PILLARD: But Congress clearly wanted to, I
12 mean, Congress chose the \$500 minimum penalty --

13 MR. BRILL: But it did so only for --

14 JUDGE PILLARD: -- and they did so because they --

15 MR. BRILL: -- unsolicited faxes.

16 JUDGE PILLARD: -- really wanted to stop the
17 problem. And so, when you talk about, you know, the main,
18 the concern that they're trying to draw a line, they're
19 trying to allow advertisements that people want, the
20 pharmacist who says hey, where's my price list for the day,
21 and they're trying to stop those that people don't want, and
22 as I understand it *Walburg* is a very unusual situation,
23 you're not usually calling and saying hey, can I send you a
24 one-time fax, that's just not the way most of this business
25 operates, right?

1 MR. BRILL: I don't know if we can tell from the
2 record how frequent that is. I'm sure there are plenty of
3 times when people are seeking more durable consent, yes.

4 JUDGE PILLARD: Yes. And that that's something
5 that is legitimately within the Agency's interest in
6 regulating, and that was contemplated by Congress might be
7 actually backed up with some consequences.

8 MR. BRILL: But, Your Honor, I think, again, we're
9 not having a policy discussion about what might have been
10 the --

11 JUDGE PILLARD: Absolutely not.

12 MR. BRILL: -- the sensible rule.

13 JUDGE PILLARD: That's not our bailiwick, and
14 that's part of my point.

15 MR. BRILL: And Section 227(b)(2) very
16 specifically says that the Commission should prescribe rules
17 to implement the requirements of the subsection. The only
18 requirements pertain to unsolicited faxes, that term is
19 mentioned seven times in (b)(1), which prohibits generally
20 the sending of unsolicited faxes, and another nine times in
21 the opt-out provision, and critically the definition of
22 unsolicited advertisement means one that's sent without
23 express consent. So, we have these two categories, and in
24 all of this Court's cases when the Commission tries to stray
25 from a category over which it's been given authority to one

1 where it doesn't, the Court has said you cannot rely on
2 statutory silence, this Court's decision in *Aid Association*
3 *for Lutherans* is a good example. The Postal Service had
4 authority to regulate the availability of both mailing
5 discounts, when it was insurance coverage that wasn't
6 duplicative of coverage already in the marketplace, and the
7 Postal Service said well, we're going to limit those
8 discounts also if we're offering an insurance type that's
9 already available in the marketplace, and this Court said
10 that doesn't work at all, insurance coverage is not
11 insurance type.

12 JUDGE PILLARD: But here we're talking about a
13 problem, and I, you know, the established business
14 relationship I think it's really fair to say that Congress
15 looked at that and said well, there is a kind of implied
16 consent there, there's a relationship and we're going to
17 allow that to be constructively kind of deemed to be
18 consented to, but we want to have a check on the back end,
19 and so we're going to have the opt-out, just to make sure.
20 And I think the way I understand the industry as a recipient
21 in some cases is that there's, in many of the cases the way
22 that consent is established there's a similar, you know,
23 uncertainty about the durability of consent, let's say, the
24 scope of consent, whether the person who gave the consent
25 really wants the facts, and so it makes sense to have one

1 opt-out regime for those businesses who are sending
2 permitted faxes.

3 And under your view you would kind of have two
4 different ones, you'd have the one that goes to the, whether
5 consent once given can be, is intended to continue, and then
6 a different notice for established business relationship
7 faxes?

8 MR. BRILL: And I think --

9 JUDGE PILLARD: It seems burdensome.

10 MR. BRILL: -- Your Honor, that Congress answered
11 this question for us in the following sense, Congress often
12 gives the FCC very broad authority in other parts of the
13 Act, the *Cablevision* case that the FCC relies on is a grant
14 of authority to police unfair acts in the cable programming
15 arena. The Commission notoriously has merger authority over
16 deals based on the public interest convenience and
17 necessity. This Court said in *Cablevision* where there's a
18 sweeping grant of authority it should be given sweeping
19 application. This is the opposite, this is a very narrow
20 grant of authority.

21 Congress could have said to the FCC we want you to
22 administer a regime to ensure that people can opt-out of
23 receiving faxes, and as they did in Section 227(d) they
24 could have applied that to all faxes, but that's not what
25 Congress did in stark contrast to 227(d), it didn't say

1 administer rules and you fill gaps and decide to which faxes
2 they apply, in which case they might have drawn the
3 conclusion that this opt-out notice, this --

4 JUDGE KAVANAUGH: Could I ask you a question about
5 the compromise line drawing? And this may be the sketchiest
6 kind of bank shot, legislative history, but I just want to
7 ask about this, which is Commissioner O'Rielly's statement
8 says if Congress was concerned that consumers that had
9 consented received fax ads might change their minds it could
10 have provided for that in the statute, but it chose not to
11 do so. In fact, I distinctly remember working on this issue
12 while it was being debated in Congress, I raised this
13 precise issue with the staff of the sponsor of the Senate
14 bill, and the answer was that a future Congress would need
15 to address it if it chose to do so. Are you aware of
16 anything more than that that we have to confirm that
17 understanding of what was going on?

18 MR. BRILL: You know, we certainly appreciate
19 Commissioner O'Rielly's corroboration of our view, I mean,
20 we're not relying on his own recollection of the legislative
21 history. I think it's clear from the Senate Report that
22 Congress was limited in its concern about opt-out notices to
23 a category of faxes that were sent without consent pursuant
24 to this established business relationship, and it manifestly
25 limited this opt-out notice provision to that category, and

1 the other category, solicited faxes, those sent with express
2 invitation or permission, were simply left out, and it's not
3 that, as Judge Pillard posits, Congress couldn't have done
4 it differently, drawn a different line, but the key here is
5 that Congress did draw a line that the Commission had to
6 respect, and we hope that this Court will enforce.

7 JUDGE PILLARD: So, just to be clear, it's your
8 view that if the FCC had thought well, this consent, you
9 know, we're supposed to only regulate unconsented faxes, so
10 we're going to define consented as those that are in an
11 individual case where consent has been obtained for that
12 fax, that they could have that rule, and that would be under
13 227.

14 MR. BRILL: You know, that kind of rule, of
15 course, would be subject to the APA, and depending on how
16 they justify it, and how they explained it, and whether the
17 burdens really can be justified in light of the concerns,
18 perhaps, I mean, we're not saying they can't, you know,
19 define the category, because 227(a)(5) does say that the
20 definition is without express invitation or permission. If
21 the Commission was concerned that those words are unclear,
22 we don't think they are, again, it perhaps could have said
23 what it means to be in the category of unsolicited faxes,
24 but they're conceding that they're regulating in that
25 category among solicited faxes of those sent with express

1 permission, and that's what we're saying they cannot do.

2 JUDGE KAVANAUGH: Okay. We'll give you time for
3 rebuttal.

4 MR. BRILL: Thank you, Your Honor.

5 ORAL ARGUMENT OF MATTHEW J. DUNNE, ESQ.

6 ON BEHALF OF THE RESPONDENTS FCC, ET AL.

7 MR. DUNNE: Good morning, Your Honors, Matthew
8 Dunne for the FCC arguing now about the rules, obviously.

9 So, Your Honors have asked a couple of questions
10 about the facts involved, and the issue that the FCC was
11 dealing with, and I think those really cut to the heart of
12 this case. It's fine to say a first fax is solicited, but
13 then there's an open question about whether second fax is
14 solicited. The FCC might have drawn a different policy and
15 said each one has to be individually consented to, but
16 that's burdensome, obviously, for both faxers and
17 recipients.

18 So, instead it decided, parties in the rule-making
19 in 2006 were asking it to clarify this issue of when is a
20 fax solicited, and it said we will presume that this consent
21 continues for a fax that customers consented to, but once
22 we're in that regime where we're going to presume consent we
23 have exactly the same problem as under the established
24 business relationship, once you've assumed consent you need
25 a way that a consumer who actually would prefer to opt out

1 can express that.

2 JUDGE KAVANAUGH: But that's not what Congress
3 said in the statute, that's the problem, Congress put in the
4 opt-out notice requirement for the established business
5 relationship, and didn't for this kind of situation where
6 there has been express permission or consent.

7 MR. DUNNE: That's right, Your Honor, but I think
8 it's important to --

9 JUDGE KAVANAUGH: It's a decent policy argument, I
10 understand, I mean, subject to examining in the context of a
11 particular case, but as --

12 MR. DUNNE: Sure.

13 JUDGE KAVANAUGH: -- to the statute, does seem to
14 draw this line related to established business relationship,
15 which was the whole motivating force behind that statute to
16 begin with, because the FCC had backtracked on that, right?

17 MR. DUNNE: I think that's right, Your Honor, I
18 think the thing that really matters here is what the Agency
19 is trying to get at a problem of unsolicited faxes, and the
20 record showed that the reasonable way to do that was to have
21 it not to prohibit certainly solicited faxes, but have an
22 opt-out notice on solicited faxes. So, it still --

23 JUDGE KAVANAUGH: But that's, it's using the
24 authority to, that's attached to unsolicited faxes to
25 regulate faxes that are sent with permission?

1 MR. DUNNE: It is, Your Honor, that's correct, but
2 that's because --

3 JUDGE KAVANAUGH: Well, that seems a problem,
4 doesn't it? I mean, that's --

5 MR. DUNNE: I don't think so, here's why, I don't
6 think we can, I don't think this Court ever turns a blind
7 eye to the policy implications of a regime when it's asking
8 what would Congress have intended. I think that those
9 questions are intertwined. So, would Congress have intended
10 a regime in which a customer can consent to a solicited fact
11 and then has no good way to get out of it? The record
12 showed, by the way, and I don't think this is --

13 JUDGE KAVANAUGH: And by the way, is it that hard
14 to get out of it? I mean --

15 MR. DUNNE: Well, yes, so let's talk about that.
16 It is --

17 JUDGE KAVANAUGH: Yes. I mean, these people have
18 given consent, so there's been by definition the category
19 we're talking about, the recipient has given express
20 permission.

21 MR. DUNNE: Right. So --

22 JUDGE KAVANAUGH: And so, that person who's given
23 express permission doesn't understand how to contact the
24 person to stop?

25 MR. DUNNE: That's what the record shows. So,

1 the -- for example, there's a problem of once, let's say
2 that a customer was, I can come up with a hypothetical, was
3 contacted on the telephone, would you consent to me sending
4 you these advertisements? Sure, that's fine. Then it
5 starts to get fax advertisements, those fax advertisements
6 at the top have the sending number, not the number you would
7 call to get out, the customer may not know what number they
8 should call to get out, and the record showed that some of
9 these faxers have numbers which only go out, right, as sort
10 of a bunch of machines that only send faxes.

11 There's some testimony from State Attorney's
12 General in the 2006 proceeding about that. Another party
13 offered evidence in the rule-making that he tried
14 repeatedly, and tried calling up people and said stop
15 sending these faxes, and the people picking up the phone
16 would say gee, I'm not the guy that sends the faxes, I don't
17 know how you get out of this. So, the Agency had a record
18 that this was an itch that needed scratching, this was a
19 real problem.

20 JUDGE PILLARD: And just to sort of give us a
21 little bit more context, it's not typically someone calling
22 on the phone and saying can I send you faxes, it's typically
23 you're providing, I mean, it's not that far off the EBR
24 (phonetic sp.) situation, you're providing information about
25 a fax somewhere in filling out a general form, and --

1 MR. DUNNE: I think that's right. I think that, I
2 think it's important to realize that there can often be a
3 lot of overlap between an established business relationship
4 fax and a solicited fax, a solicited fax, there can't be a
5 definitional overlap because an EBR has not been explicitly
6 consented to, but if a party say checks the box that says
7 keep sending me faxes, that's the only difference is that
8 they've checked this box. So, the facts on the ground are
9 that there might be a very similar and overlapping set of
10 characteristics.

11 And so, again, I'll return to the point that --

12 JUDGE RANDOLPH: The problem I have is I think you
13 would have had maybe a stronger argument if you adopted this
14 rule pursuant to your general rule-making authority, and
15 that gets you into *Mourning v. Family Publications Service*,
16 and so on and so forth. But the FCC specifically said that
17 it's resting on 227, and it's hard for me to see how you can
18 take 227 and impose a requirement that is on solicited
19 faxes.

20 MR. DUNNE: Well, here's the link in our eyes,
21 Your Honor, 227(b) prohibits unsolicited faxes, and tasks
22 the FCC with implementing rules, issuing rules to implement
23 that restriction. The Commission was worried about those
24 faxes after the first fax that the customer no longer wants
25 to get, those are unsolicited faxes, so the Agency is still

1 dealing with that problem of unsolicited faxes, which
2 Congress has instructed it to attack their implementing
3 rules.

4 JUDGE KAVANAUGH: Well, Commissioner Pai said
5 something that caught my eye, when the legislature passes
6 those statutory scheme that precisely tracks a congressional
7 compromise interpreters must respect the contours of that
8 compact, I assume you agree with that?

9 MR. DUNNE: Yes.

10 JUDGE KAVANAUGH: And here, the point being the
11 compromise or the problem was the established business
12 relationship and unsolicited faxes more generally, there may
13 be a problem with these consented to faxes in trying to
14 withdraw permissions, but that's still not an unsolicited
15 situation, and there's no, is there any indication, let me
16 put it this way, is there any indication in the legislative
17 record that Congress or any member of Congress was seeking
18 to impose the opt-out notice requirement on all faxes?

19 MR. DUNNE: No, Your Honor, that problem emerges
20 through the expert agency trying to implement this actual
21 regime.

22 JUDGE KAVANAUGH: But no one, just, so no one ever
23 said that in Congress?

24 MR. DUNNE: No, but it did, of course, task the
25 Agency with implementing this ban on unsolicited faxes. So,

1 I understand that two of the FCC commissioners thought that
2 they saw a strict line in the sand that Congress had drawn,
3 but I would suggest that given the policy implications that
4 doesn't make a lot of sense because you're still left with
5 this problem of, that customers don't want these faxes
6 anymore. I believe Judge Randolph was asking is that even
7 an unsolicited fax anymore? The Agency could have defined
8 unsolicited fax, again, to require agreeing to each one,
9 so --

10 JUDGE PILLARD: I mean, the Agency could also have
11 said once you give your agreement there's no getting out,
12 you can never revoke that, and that is what it means up
13 front.

14 JUDGE KAVANAUGH: That would be a separate
15 problem.

16 MR. DUNNE: Right.

17 JUDGE PILLARD: But they could do that, right?
18 And so --

19 MR. DUNNE: I think they could.

20 JUDGE PILLARD: -- the question if they could do,
21 you have to do every single time --

22 MR. DUNNE: Right.

23 JUDGE PILLARD: -- if they could say look, you
24 know, eyes open, you agree to this, I mean, clearly --

25 MR. DUNNE: I think that's exactly, that, to your

1 point that Congress tasked, in the TCPA said it was trying
2 to balance individual privacy rights on the one hand, and
3 commercial freedoms of trade on the other, so clearly the
4 statute involves a kind of balancing. And the Agency as
5 the, you know, expert in this field based on a record about
6 these problem faxes is trying to balance those aims. So, it
7 asks, again, of course not prohibiting solicited faxes, but
8 imposes a notice at the bottom of the solicited faxes
9 because the record showed otherwise, the parties would have
10 trouble getting out of these faxes.

11 JUDGE RANDOLPH: You know, one of your arguments
12 leaped out at me when I read your brief, after stating that
13 (b) (1) (D) nowhere suggests that the Commission is not
14 permitted to adopt additional rules to ensure the general
15 prohibition against unsolicited faxes not certain, which is
16 what your argument is here --

17 MR. DUNNE: Correct. Yes --

18 JUDGE RANDOLPH: -- right?

19 MR. DUNNE: -- Your Honor.

20 JUDGE RANDOLPH: But then it's the next line that
21 struck me, it says nor have Defendants explained why
22 Congress would have affirmatively prohibited such a
23 requirement for fax ads sent with permission. You know,
24 that to me is an invitation for, it's a power grab by the
25 Agency because Congress doesn't have to affirmatively

1 prohibit something, if you read the statute --

2 MR. DUNNE: Agreed, Your Honor.

3 JUDGE RANDOLPH: -- that says this far and no
4 further --

5 MR. DUNNE: Agreed, Your Honor. So, probably in
6 artfully stated, I think our point is given a regime in
7 which the Agency is tasked with preventing unsolicited
8 faxes, and given the state of the record that this was the
9 best way to get at that, given, again, those policy
10 considerations, then I think in that realm the question
11 under *Chevron I* is, you know, is this something that's out
12 of bounds.

13 JUDGE RANDOLPH: Right. Now, my only point was
14 Congress doesn't have to say and you cannot regulate --

15 MR. DUNNE: Absolutely.

16 JUDGE RANDOLPH: -- solicited faxes.

17 MR. DUNNE: We certainly don't contest that, Your
18 Honor. Okay. Thank you. Sorry, other questions? I'll see
19 you --

20 JUDGE KAVANAUGH: Thank you.

21 MR. DUNNE: -- again in a moment. Thank you.

22 JUDGE KAVANAUGH: Yes.

23 ORAL ARGUMENT OF AY TAN Y. BELLIN, ESQ.

24 ON BEHALF OF THE INTERVENORS YAAKOV, ET AL.

25 MR. BELLIN: Good morning, Your Honors, Aytan

1 Bellin for the Bais Yaakov Intervenors.

2 Your Honor, our position is that under *Chevron*
3 this regulation is fully appropriate. The TCPA says nowhere
4 that the FCC, it nowhere prohibits the FCC from regulating
5 solicited faxes. It does talk about --

6 JUDGE KAVANAUGH: You just walked right into Judge
7 Randolph's last question.

8 JUDGE RANDOLPH: That's a --

9 MR. BELLIN: I understand, and I --

10 JUDGE RANDOLPH: That's the argument that it seems
11 to me misstates the way that courts go about interpreting
12 statutes.

13 MR. BELLIN: Well, actually, Your Honor, I
14 believe --

15 JUDGE RANDOLPH: They don't have to prohibit it.

16 MR. BELLIN: I believe in the case of *National*
17 *Association*, this Court ruled that Congress ordinarily
18 expects an agency to regulate circumstances or parties
19 beyond those explicated in the statute, and that is
20 something that this Court has held, I believe Your Honor may
21 have been the writer of that opinion. And I think that the
22 fact of the matter is in a *Chevron* context the first
23 question under *Chevron I* is what the Agency did prohibited
24 by the statute? The answer in this case is no. Their
25 arguing express the NEAs argument, which this Court has

1 struck down many time in the administrative context.

2 JUDGE KAVANAUGH: But it doesn't have to be
3 expressly prohibited, we look at *Chevron* itself tells us,
4 footnote nine, to all the tools of statutory construction to
5 determine whether the statute as a whole prohibits this.

6 MR. BELLIN: Well, they pointed to nothing in the
7 statute which says anything about flow through faxes.

8 JUDGE KAVANAUGH: Or fails to authorize, another
9 way to say it. Yes.

10 MR. BELLIN: Well, that's true, but under *Chevron*
11 I you have to, I think everyone here would agree that the
12 statute says nothing about solicited faxes, it says that the
13 Agency, it talks about unsolicited faxes, but says nothing
14 about solicited faxes.

15 JUDGE RANDOLPH: Now, that's an argument for the
16 Class Action Defendants, it says nothing about unsolicited
17 faxes, and the only thing that, or solicited faxes, and the
18 only thing it regulates is unsolicited faxes.

19 MR. BELLIN: Your Honor, that was the same
20 argument that was made in the *Mourning* case before the
21 Supreme Court in 1973, and the Defendants there argued the
22 statute had said that you could only regulate a situation
23 where a finance charge was imposed, and the Agency there
24 said you could also regulate a situation where something,
25 where the payment was in four installments.

1 JUDGE RANDOLPH: Yes, I remember it well, I argued
2 the case.

3 MR. BELLIN: That's right. Okay. So, in that --

4 JUDGE RANDOLPH: Not for the Defendants.

5 MR. BELLIN: I'm sorry?

6 JUDGE RANDOLPH: For the Agency.

7 MR. BELLIN: So, in that case, Your Honor --

8 JUDGE RANDOLPH: And was surprised that we won.

9 MR. BELLIN: Well, I think you probably did a
10 better job than you thought, Your Honor, but the bottom line
11 is that the Supreme Court over 40 years ago made clear that
12 the fact that a statute specifically talks about regulating
13 one thing, in the *Mourning* case it talked about specifically
14 regulating finance charges, but the Agency was able to
15 regulate installment payments, I mean, it just wasn't in the
16 statute, it's the exact same thing here. Similarly, in the
17 *National Association* case --

18 JUDGE RANDOLPH: But the problem is, as I said to
19 Counsel for the FCC, the FCC is not relying on the broad
20 regulatory provision that gives them authority to promulgate
21 regulations in order to implement the statute, it's relying
22 on a very specific portion of the FCC's authorization, which
23 is 227(b), and that's what triggered this dispute because of
24 the liability that's attached to that.

25 MR. BELLIN: Well, 227(b) allows the Agency to

1 issue regulations to enforce that section, and that's the
2 *Chevron II* part, Your Honor. This regulation protects
3 against the sending of unsolicited faxes, and allows people
4 to get out of getting unsolicited faxes. First of all, the
5 Agency recognized in the 2006 ruling that because Congress
6 had required in the JFPA that consent could be received
7 either orally or written, they were concerned that there
8 would be at number times that there would be phony claims of
9 consent, or what they called, quote, unquote, erroneous
10 claims of consent. And representing Plaintiffs in these
11 cases I can tell you that in almost every single case the
12 Defendants say we got consent. Well, when did you get it?
13 Well. Do you have anything in writing? No, we have nothing
14 in writing, but you consented to it.

15 And so, there is a lot of examples of fraudulent
16 and erroneous claims of consent, and in those situations if
17 the solicited facts rule were not there you'd have
18 situations where the companies would say well, we got, it
19 was solicited, we're sending you this fax, and because it's
20 solicited we don't have to tell you how to opt-out. But the
21 problem is, Your Honor, the Agency found that a lot of
22 those --

23 JUDGE KAVANAUGH: It seems a mismatch, though,
24 between the problem and the solution.

25 MR. BELLIN: I respectfully disagree, Your Honor,

1 because the problem is that the parties who did not get
2 consent will say that they did, and then would not put that,
3 put a way to opt-out and people, what happened is people
4 would be getting --

5 JUDGE KAVANAUGH: People will still do that even
6 with the opt-out notice.

7 MR. BELLIN: No, they won't because under the opt-
8 out regime, because it's required both for solicited and
9 unsolicited faxes, an entity that claims oh, it's solicited,
10 you agreed to it still has to include the opt-out notice, so
11 it covers the situation where when they're lying about
12 that --

13 JUDGE KAVANAUGH: I know, but they still might
14 continue sending them saying they consented when they hadn't
15 consented. I mean --

16 MR. BELLIN: Yes, but --

17 JUDGE KAVANAUGH: -- the problem is consent is not
18 being respected, which I think is what you're articulating,
19 or a failure to get consent is not being respected.

20 MR. BELLIN: And this is a way to ensure that
21 people who get faxes for whom that claim of consent is a lie
22 or erroneous have a way of opting out, that's exactly what
23 the statute is supposed to protect, protect against
24 unsolicited faxes. And the Agency made a reasonable
25 decision with their expertise that because it was, because

1 Congress had required an oral, allowed for oral consent, or
2 non-written consent that people would be getting these
3 things in a fraudulent way, these people had to have a way
4 to get out of getting those unsolicited faxes. Now, the --

5 JUDGE PILLARD: Now, I mean, you acknowledge that
6 they get one free fax, right? They should be able, they
7 think they have consent, whatever, they're willing to stand
8 up in court and prove that they had consent by let's say
9 phone, they have a log and they keep, and then they send a
10 fax, and it doesn't have an opt-out notice, but they have a
11 different way of proving consent, liable or not liable?

12 MR. BELLIN: If they sent a fax without an opt-out
13 notice, are you saying they actually had consent, Your
14 Honor? I'm sorry, I'm not following.

15 JUDGE PILLARD: They actually had consent.

16 MR. BELLIN: If they actually had consent then,
17 and they don't include the opt-out --

18 JUDGE PILLARD: Yes.

19 MR. BELLIN: -- notice on it, then they are
20 liable, and the reason --

21 JUDGE PILLARD: The mismatch I think is that that
22 is about ensuring the consent for the next fax, the consent
23 or not, it's about saying okay, I consented to that one,
24 I've seen it, I, you know, I had my dog and pony show, I
25 don't want it, and then you opt-out, and so, there's this

1 funny kind of time lag problem with the opt-out being the
2 basis of consent for the fax on which it appears.

3 MR. BELLIN: Well, I think the mismatch is, Your
4 Honor, that you're requiring the match to be to the fax that
5 was just sent.

6 JUDGE PILLARD: Yes.

7 MR. BELLIN: There's nothing in the statute that
8 requires that. The purpose of the statute is to make sure
9 that people don't get unsolicited faxes, whether it's that
10 very fax, or faxes in the future.

11 JUDGE RANDOLPH: Was there any evidence, to follow
12 up on the point you just made that makes me wonder, do you
13 know whether there was any evidence before the Commission
14 indicating that if you had an opt-out notice requirement for
15 every fax that's advertisement that's sent that it would
16 encourage unsolicited faxes to be sent because if the
17 recipient does not opt-out that's a good argument that they
18 consented to?

19 MR. BELLIN: No, Your Honor, the consent has to be
20 express according to the statute. It's not a consent by
21 silence. In fact, the FCC has --

22 JUDGE RANDOLPH: But I'm talking, I'm not talking
23 about the, I'm talking about during a lawsuit if the person
24 receiving the unsolicited fax did not opt-out, it contained
25 an opt-out clause, that is, is it at least maybe a jury

1 argument that they actually consented to it?

2 MR. BELLIN: No. No, it isn't, Your Honor. The
3 consent under the FCC rules has to be consent to receive fax
4 advertisements, and must be express under the statute.

5 JUDGE RANDOLPH: Oh, well, yes, but --

6 MR. BELLIN: That is not express consent --

7 JUDGE RANDOLPH: -- the sender --

8 MR. BELLIN: -- not opting out.

9 JUDGE RANDOLPH: -- would claim that the person
10 actually consented, and as proof of that look, they didn't
11 opt-out, and they had an opt-out clause.

12 MR. BELLIN: But a negative option is not
13 permissible under the statute, that's what I'm saying, the
14 statute, the statutory language requires that the consent be
15 express, that the person affirmatively consent, and the FCC
16 has ruled --

17 JUDGE RANDOLPH: They argue in a telephone
18 conversation that she consented to a fax, and as proof of
19 that we sent her a fax really unsolicited, but we sent her a
20 fax with an opt-out clause and she didn't opt-out.

21 MR. BELLIN: I've never heard that argument made,
22 Your Honor. I mean, I just haven't. And the problem also
23 is the assumption underlying that I believe is that it was,
24 is that it's inappropriate for the Agency to not require
25 everybody who gets an unsolicited fax, or an unsolicited fax

1 that's claimed to be solicited to bring a cause of action.
2 What the Agency was saying is look, we want to give people
3 the ability who are getting unsolicited faxes that are
4 quote, unquote erroneously called solicited to get out of
5 it, and we don't want them to have to bring a lawsuit, a
6 lawsuit is very expensive, as these cases show they go on
7 for years, even in individual cases.

8 JUDGE KAVANAUGH: Your position is that all
9 permissible fax advertisements, whether through an
10 established business relationship, or through express
11 permission, must contain an opt-out notice?

12 MR. BELLIN: And the reason for that is two-fold.

13 JUDGE KAVANAUGH: But that's why, if that's true
14 Congress could have said that pretty simply.

15 MR. BELLIN: But Congress left to the Agency to
16 issue regulations that would support persons not getting
17 unsolicited faxes. And it was reasonable for the Agency in
18 its expertise to say look, we know people are fraudulently
19 sending these things, we know people make errors in sending
20 these things, we want to get a lot of people to opt-out of
21 getting unsolicited faxes, that's number one. Number two,
22 to also support the unsolicited fax requirement that
23 Congress has it was reasonable for the Agency to say well,
24 just because you consented once doesn't mean you want them
25 forever, even though the Agency allowed industry, gave them

1 a lot of latitude, said you get one consent, and that's
2 fine, goes on forever, and so the Agency said but, you know,
3 you've got to give people a chance to opt-out, if people
4 don't want them anymore, Your Honor, and this is very
5 important, if people don't want them anymore then the faxes
6 that are coming up are unsolicited.

7 JUDGE KAVANAUGH: Right.

8 MR. BELLIN: But if there's no way to get out then
9 they keep on getting these unsolicited faxes, and that is
10 exactly what the TCPA was. The fact that Congress in a
11 statute only required the opt-out notice for unsolicited
12 faxes does not prevent the Agency in an effort to support
13 the statute's policy in preventing opt-out notices, from
14 requiring opt-out notices on, were maybe erroneously called
15 solicited faxes, or actually are solicited faxes to prevent
16 future unsolicited ones.

17 JUDGE KAVANAUGH: Okay.

18 JUDGE PILLARD: But let me ask you, Mr. Bellin,
19 the same question I asked other Counsel. How typically is
20 consent to faxes obtained in your experience?

21 MR. BELLIN: Your Honor, in my experience consent
22 is almost never gotten, I mean, I hate to say this, but as a
23 Plaintiff's attorney I have not seen it gotten, a lot of
24 people claim well, they gave us their number, they gave us
25 their fax number, that is not sufficient under the FCC

1 rules.

2 JUDGE PILLARD: But that's what their -- so, when
3 that issue is litigated they are showing what? They are
4 showing a phone log, they are showing a list of fax numbers
5 that accompanied submission of a contract, or that a company
6 had access to a webpage, or what?

7 MR. BELLIN: It's variable. Sometimes it's just
8 oral testimony. I have a case that's stayed in the District
9 of New Hampshire right now, it's one of the cases here,
10 where at the deposition, you know, they said well, we don't
11 have any records, you know, but we, sometimes we told them,
12 sometimes we said would you like us to send a fax about our
13 products and they said okay. That's what was the type of,
14 that is the typical deposition testimony, it is rare that
15 you have anyone come forward with anything in writing, I
16 don't think I've seen it where some disagreed. There may be
17 one or two cases floating out there.

18 JUDGE PILLARD: And it's not typically happening
19 through internet forms? That's not this area --

20 MR. BELLIN: No, not --

21 JUDGE PILLARD: -- is my --

22 MR. BELLIN: -- not that I've seen, Your Honor. I
23 don't see it through internet forms. The experience of
24 people is generally they're getting these faxes, they never
25 ask for them, and when you try to press the Defendants for

1 proof you get all sorts of vague comments, they sent us the
2 fax number. I have a case now in the Southern District of
3 New York where they say well, they sent us their letterhead
4 with the fax number on it, so therefore that's consent.

5 JUDGE KAVANAUGH: Okay. I think we have your
6 argument on this point, and we'll hear a couple of minutes
7 from rebuttal, and then hear from you later. So --

8 MR. BELLIN: Thank you, Your Honor.

9 JUDGE KAVANAUGH: Yes.

10 ORAL ARGUMENT OF MATTHEW A. BRILL, ESQ.

11 ON BEHALF OF THE CLASS ACTION

12 DEFENDANT-PETITIONERS AND INTERVENORS

13 MR. BRILL: I'd like to start with the *Mourning*
14 case since the Commission and Intervenor are relying on
15 that, because I think it illustrates just how different that
16 statute was at issue in the Truth in Lending Act, and why it
17 really makes our point here. The Truth in Lending Act was a
18 deliberate desire by Congress to give the Federal Reserve
19 Board sweeping authority, the statute said that the
20 regulations issued by the Board may contain such
21 classifications, differentiations, or other provisions, and
22 may provide for such adjustments and exceptions for any
23 class of transaction, as in the judgment of the Board are
24 necessary and proper to effectuate the purposes of the Act,
25 to prevent circumvention, or evasion thereof.

1 And in response to that sweeping language the
2 Supreme Court said Congress made a decision to lay the
3 structure of the Act broadly and to entrust its construction
4 to an agency, and it goes on to talk about there was clear
5 desire to prevent evasion. This statute, unlike some other
6 parts of the Communications Act, couldn't be more different.
7 There was a judgment to include a very narrow opt-out
8 provision that speaks only of unsolicited advertisements,
9 and Congress did speak to its intent by defining unsolicited
10 advertisement to mean a fax sent without express permission.

11 JUDGE PILLARD: What about *Texas Rural Legal Aid*
12 where there's a prohibition on political activity, and the
13 question was whether that extended to other controversial
14 local issues?

15 MR. BRILL: I think that's a lot like *Mourning*,
16 Your Honor. What the statute said in that case was that
17 Legal Services Corp. should make grants and contracts as are
18 necessary to carry out the purposes and provisions of the
19 Act. And it further gave it express discretion to provide
20 the most economical and effective delivery of legal
21 assistance. So, thereto we have a very sweeping grant of
22 authority, there's little doubt that the gaps that were
23 being litigated were within that sweeping grant of
24 authority.

25 JUDGE PILLARD: But here the general authority is

1 to bar, shall be unlawful, right? Person within the United
2 States to use any fax machine to send an unsolicited
3 advertisement. And so, the implementation under 227 is what
4 is unsolicited, and how can a consumer express hey, that's
5 unsolicited, stop? Why isn't that just, I mean, if you
6 didn't have the rest of the --

7 MR. BRILL: Yes, so to --

8 JUDGE PILLARD: -- statute wouldn't that be really
9 within *Chevron* for them to read that and say well, we're
10 going to help make that clear?

11 MR. BRILL: No, Your Honor, I mean --

12 JUDGE PILLARD: No?

13 MR. BRILL: -- a couple of points. One is that
14 the FCC concedes that it's achieving its policy goals by
15 regulating the transmission of an unsolicited fax, it's
16 easiest to see in a single request, or in your earlier hypo
17 that first fax as to which, you know, there was clear
18 consent.

19 JUDGE PILLARD: You just said unsolicited, but you
20 meant solicited?

21 MR. BRILL: I'm sorry, solicited, yes. Those sent
22 with permission. So, they're regulating those sent with
23 permission to achieve a policy goal, Congress simply didn't
24 give it that authority. This is a lot like the Commission's
25 argument in the *U.S. Telecom* case where the dispute was over

1 unbundling authority with telephone network elements, and
2 whether these FCC could delegate that authority to state
3 public utility commissions, and the Commission argued there
4 as here that it was achieving the broad interests in
5 unbundling, and nothing in the statute prohibited that kind
6 of sub-delegation.

7 And what the Court said was that that silence just
8 left the lack of authority untouched, and it said I think to
9 Judge Randolph's earlier point you don't need thou shalt not
10 language in the statute, and the absence, quote, was in
11 other words, the failure of Congress to use thou shalt not
12 language doesn't create a statutory ambiguity of the sort
13 that triggers *Chevron* deference. And I think that's exactly
14 this case, there's no question that there's nothing
15 affirmative in this Act that gives the Commission authority
16 over faxes sent with express permission, to the contrary,
17 the 16 references to unsolicited advertisements all
18 incorporate the definition of that term of art, which is a
19 fax sent without express permission, and the FCC concedes
20 it's regulating the very thing Congress said it shouldn't
21 regulate, faxes sent with express permission.

22 And finally, to this question of disputes over
23 whether consent was in fact given, that doesn't justify this
24 sort of prophylactic measure, and I respectfully disagree
25 with Plaintiff's Attorney's representation that consent is

1 never obtained, by my clients it's always obtained, and in
2 the trial court cases we have affidavits from pharmacy
3 customers who express not only their willingness but their
4 desire to receive our pricing information. And the key is
5 that triers of fact will resolve those disputes, we have a
6 burden to prove consent is an affirmative defense, courts
7 don't just take our say-so, and we'll lose these cases if we
8 can't demonstrate evidence of consent. So, that's really a
9 red herring, if that's really the concern that we don't
10 know, triers of fact will decide those factual questions and
11 it obviates the need to regulate the very thing that
12 Congress carved out of the statute.

13 JUDGE KAVANAUGH: Okay. Thank you. We'll move on
14 to the waiver decision argument. Mr. Bellin.

15 **II. WAIVER DECISION**

16 ORAL ARGUMENT OF AY TAN Y. BELLIN, ESQ.

17 ON BEHALF OF THE PETITIONERS YASKOV, ET AL.

18 MR. BRILL: Thank you, Your Honors. I'd reserve
19 three minutes of rebuttal time, please.

20 Your Honor, this Court is well aware, Congress
21 provided a tripartite enforcement scheme under the TCPA for
22 violations of regulations promulgated pursuant to 227(b).
23 First, the FCC has the authority to enforce those
24 regulations administratively; second, the states have the
25 authority to enforce them through judicial proceedings. But

1 Congress was not satisfied with leaving the choice of
2 whether to enforce these regulations in the hands of the FCC
3 or the states.

4 Congress specifically created a private right of
5 action which gave private individuals the power to sue
6 defendants for sending faxes in violation of regulations
7 promulgated pursuant to 47 U.S.C. 227(b). The statute,
8 Congress gave the courts, and specifically gave the courts
9 and not the FCC, not anybody else the authority to determine
10 whether the statute had been violated through the violation
11 of a regulation to determine whether there should be treble
12 damages as a result of willful or knowingly violations, and
13 to determine what sort of injunctive relief to grant under
14 the statute.

15 This is a clear situation which is covered under
16 the *Adams Fruit* decision of the Supreme Court, and the
17 *Natural Resources Defense Council* case in this Court, which
18 basically say that when a statute specifically gives an
19 individual the right of action, and puts the authority over
20 determining whether that cause of action has been proven in
21 the hands of the court then an administrative agency has
22 absolutely no power to create defenses to those causes of
23 action.

24 Now, what they've done here, Your Honors, they've
25 used, they're bootstrapping themselves into jurisdiction.

1 They're basically saying well, we're going to use our waiver
2 authority, our waiver, which we created by the way under 47
3 C.F.R. 1.3, and we're going to say that we're going to waive
4 the regulation, and therefore the statutory right of action
5 that the statute actually gives you, you can't sue anymore.
6 And the Agency can't do that, this Court held that in
7 *Natural Resources Defense Council* case. In that case EPA
8 had actually created a standard by rule which in the
9 standard said that there are certain circumstances where the
10 standard doesn't apply.

11 So, they actually did it by rule, not through
12 waiver, with notice and comment, et cetera, and this Court
13 said doesn't matter that you're doing it by rule, it doesn't
14 matter that the statute, the Clean Air Act provides for the
15 fact that you can sue for a violation of a regulation
16 created by the EPA. This Court said EPA has no authority to
17 do that. Now, if EPA did not have authority to do that by
18 rule, Your Honor, an a fortiori they don't have the power to
19 vitiate a statutory cause of action through the waiver of a
20 rule. Now, the --

21 JUDGE RANDOLPH: There's another line of cases,
22 though, that I don't fault you because nobody has raised
23 them, there's a line of administrative law cases under the
24 heading primary jurisdiction where a suit between private
25 parties takes place, and the Court, the Supreme, there are

1 Supreme Court cases on this, holds that suit in abeyance,
2 and orders the parties to repair to the administrative
3 agency to give a definitive interpretation of its statute
4 that's at issue in the case. And then the case comes back.
5 Now, this is different because it wasn't, I assume that none
6 of these trial courts, the 29 cases or whatever they are,
7 ordered the parties to repair to the FCC to get its opinion,
8 but the analogy is there, that the Agency then makes a
9 decision on the basis of its statute that effects the
10 private cause of action.

11 MR. BRILL: Well, I --

12 JUDGE RANDOLPH: Are you familiar with that line
13 of cases?

14 MR. BRILL: Yes, I'm familiar with that line of
15 cases, Your Honor. I think there's a big difference here.
16 Congress in the statute has said who is to decide whether
17 there's been a violation of the regulation? Congress in the
18 statute said it's the courts and not the FCC. There's not a
19 question here of whether the regulation is unclear, although
20 they say there is, but that's in the first part of the
21 argument. Assuming that the regulation is clear, it's a
22 simple issue of fact which is something that District Courts
23 typically decide, juries decide that, District Courts decide
24 that, there's no unclarity that requires the expertise of
25 the Agency, usually those sort of --

1 JUDGE KAVANAUGH: But the FCC's order --

2 JUDGE RANDOLPH: Was unclear.

3 JUDGE KAVANAUGH: -- was unclear.

4 MR. BRILL: Well, Your Honor, here's the thing,
5 our position is that the FCC's order, well, first of all,
6 the regulation was absolutely clear, and the regulation --

7 JUDGE KAVANAUGH: The Federal Register notice and
8 the report and order have that, you're familiar with what
9 I'm talking about?

10 MR. BRILL: Yes.

11 JUDGE KAVANAUGH: Yes.

12 MR. BRILL: Footnote 154 out of over --

13 JUDGE KAVANAUGH: Yes.

14 MR. BRILL: -- 200 footnotes there's --

15 JUDGE KAVANAUGH: Well, the footnotes can be where
16 all the important stuff happens, so --

17 MR. BRILL: Of they can --

18 JUDGE KAVANAUGH: Yes.

19 MR. BRILL: -- Your Honor, and I --

20 JUDGE KAVANAUGH: Yes.

21 MR. BRILL: -- understand that.

22 JUDGE RANDOLPH: Yes. Justice Douglas once quoted
23 Chief Justice Hughes in an opinion where he was dissenting,
24 and the quotation was footnotes don't count, right? But he
25 said it in a footnote.

1 MR. BRILL: Irony. Yes. That's the definition of
2 irony.

3 JUDGE KAVANAUGH: Yes.

4 MR. BRILL: But I would say, Your Honor, I mean, I
5 can move on to the issue of whether the waiver fits under
6 the radio and so forth, but I first want to focus on the
7 issue of the statute. The statute says when there's a cause
8 of action; the statute does not give the authority to the
9 Agency to waive the statutory cause of action. The way it
10 works is, Your Honor, the statute says --

11 JUDGE KAVANAUGH: But it's a cause of action for
12 violation of the regulations --

13 MR. BRILL: Correct.

14 JUDGE KAVANAUGH: -- and FCC argues that it in
15 turn gets to promulgate regulations, and enforce those
16 regulations, not just enforce but interpret them, and then
17 in this case they determined that they had been sending
18 conflicting signals in the prior regulation.

19 MR. BRILL: Well, Your Honor, they didn't
20 interpret the regulation here, actually, they said the
21 regulation was completely clear, what they did is they've
22 giving an excuse not to follow the regulation, and that's a
23 significant --

24 JUDGE KAVANAUGH: Well, yes, okay.

25 MR. BRILL: -- difference. If they had said that

1 they, if they interpreted the term solicited facts, or
2 unsolicited facts in a particular way then we would be bound
3 by that, but that's not what they did, what they did was
4 grant a waiver --

5 JUDGE KAVANAUGH: They read, I'll use the word,
6 they read their prior issuances on this issue and said we
7 legitimately believe that we confused the regulated party by
8 saying two different things simultaneously, and as a
9 regulated entity it would be unfair, due process kind of
10 concern, to hold someone liable, or to expose them to
11 massive liability based on inconsistent statements that we
12 gave.

13 MR. BRILL: The statute simply does not give them
14 the authority to create a defense to the cause of action.
15 It just doesn't. It says under *Adams Fruit*, *Adams Fruit*
16 says if the Court makes a, if the statute gives the Court
17 the power to make the determination whether there's a
18 violation then the Agency simply does not have the power.
19 It's an Agency power grab here, Your Honor, they're trying
20 to undermine, undermine the statute, a statutory right that
21 was vested, that was created by Congress. The moment the --

22 JUDGE KAVANAUGH: You agree that the cause of
23 action here, though, is a cause of action for violations of
24 the regulation?

25 MR. BRILL: True, and that was true in the *Natural*

1 *Resources Defense Council* case, as well, where this Court
2 held that just because it was a violation of a standard, a
3 regulation that the EPA created didn't mean that the EPA had
4 the power to create a defense to that standard. It
5 specifically said, this Court in that case said that because
6 the statute said that the courts have to make a
7 determination of the violation and not the Agency, the
8 Agency --

9 JUDGE KAVANAUGH: But I don't think, that case
10 didn't involve, you know, past Agency issuances of
11 confusing, in confusing ways that the Agency said would be
12 unfair to use, just common parlance, unfair to expose
13 someone to massive liability, or any liability based on
14 something that we did that was confusing.

15 MR. BRILL: Respectfully, Your Honor, I think that
16 we're, that by, this question conflates the two separate
17 issues, one, the first issue is whether the Agency has any
18 authority whatsoever to create a defense to the statutory
19 cause of action. Your question more turns to if they do
20 have that authority did the exercise it properly? Was it
21 properly -- and the first point I want to make, and I won't,
22 I'll move on from it --

23 JUDGE KAVANAUGH: Yes.

24 MR. BRILL: -- but the first point is that the
25 Agency doesn't have that authority, in fact, in *Natural*

1 *Resources Defense Council* case the Agency had argued well,
2 we do have the authority because we are the ones who
3 promulgated the regulations, and therefore we can put in
4 these defenses, and this Court said no, you don't, when the
5 statute is clear as to who has the authority to determine
6 whether a violation has occurred, and says it's the courts,
7 it's the courts, and not the Agency. That's a decision made
8 by Congress, it's not a decision made by the Agency.

9 Now, I'll move on to the second issue, even
10 assuming, by the way, there's absolutely no case that anyone
11 has ever cited, and that we're aware of where an
12 administrative agency was permitted to vitiate a cause of
13 action provided for under a statute when Congress has not
14 explicitly provided that they're allowed to do so. And in
15 fact, the General Savings Statute, which is 1 U.S.C. 109 --

16 JUDGE KAVANAUGH: Is there any case saying the
17 opposite?

18 MR. BRILL: Well, I think so, Your Honor. I think
19 the *Natural Resources Defense Council* case says that. I
20 think that some of the other cases that we cited say the
21 opposite.

22 JUDGE KAVANAUGH: Well, I didn't argue that, but I
23 wrote it, so I --

24 MR. BRILL: I understand that.

25 JUDGE KAVANAUGH: Yes.

1 MR. BRILL: I don't mean to quote yourself back to
2 you, Your Honor --

3 JUDGE KAVANAUGH: That's good.

4 MR. BRILL: -- but I was very happy to see that
5 you had written that decision.

6 JUDGE KAVANAUGH: Yes.

7 MR. BRILL: But the point is that the General
8 Savings Statute is another thing that's important to
9 consider here. The General Savings Statute, 1 U.S.C. 109,
10 says that the only way that, if there's a vested statutory
11 cause of action the only way that the cause of action can be
12 done away with is by Congress explicitly passing legislation
13 that says that they're doing away with the cause of action.
14 That was to get rid of the common law rule. Now --

15 JUDGE RANDOLPH: What about the Supreme Court's
16 line of cases, what about *Jewel Tea*, the Portal-to-Portal
17 Act.

18 MR. BRILL: I'm sorry, I'm not familiar with that,
19 Your Honor, I don't believe anyone has cited these cases in
20 the papers.

21 JUDGE RANDOLPH: Yes, they're in the 1940s, and
22 massive liability was incurred by mines because they didn't
23 pay the miners at the time they entered the mine, as opposed
24 to when they got to the mine face, and, or the coal face,
25 and Congress passed statutes abrogating it in the Portal-to

1 Portal Act, and the Supreme Court upheld it.

2 MR. BRILL: Right. That's fine, and Congress can
3 do that.

4 JUDGE RANDOLPH: Yes.

5 MR. BRILL: Congress didn't do that here.
6 Congress hasn't passed any statute abrogating any vested
7 statutory cause of action.

8 JUDGE RANDOLPH: Well, Congress can do it, why
9 can't the Agency when it's a regulation?

10 MR. BRILL: Well, Your Honor, I mean, the reason
11 the Agency can't do it, as Your Honors have pointed out on
12 the other argument, is they were never given any authority
13 to do that, and they can't do it by regulation when the
14 statute says that they don't have, that gives the courts the
15 power to decide it. They simply do not have that power, if
16 Congress has not passed any statute, and the only power the
17 Agency has is the power that Congress delegated to it, and
18 Congress has not vitiated the cause of action, then a
19 fortiori the Agency can't vitiate the cause of action. I do
20 want to move on --

21 JUDGE KAVANAUGH: Why don't -- okay.

22 MR. BRILL: -- if I may, to the waiver.

23 JUDGE PILLARD: I'd like to hear about the good
24 cause argument.

25 MR. BRILL: Yes. Okay. So, the Commission

1 basically sort of, and I'm using this phrase, made a loosey-
2 goosey determination that there was some sort of ethereal
3 vapor of confusion created by this one footnote at 220, not
4 a single, not a single applicant for a waiver ever said they
5 read the footnote, ever said they were confused by the
6 footnote, none of the, all they said was is there are these
7 footnotes, and in fact, in the comments if you look at
8 them --

9 JUDGE KAVANAUGH: But if you read the footnote --

10 MR. BRILL: What?

11 JUDGE KAVANAUGH: If you read the footnote you
12 would say oh, the opt-out notice requirement does not apply?

13 MR. BRILL: No, Your Honor, if I read the footnote
14 and I were an attorney for Staples, or Amdun, big companies,
15 and they came to you and said gee, we see in this footnote
16 it says it doesn't apply, but then we see in the text it
17 says it does, we've seen the regulation says it does, if I
18 recommended to --

19 JUDGE KAVANAUGH: We note that the opt-out notice
20 requirement only applies to communications that constitute
21 unsolicited advertisements.

22 MR. BRILL: Your Honor, none of the Defendants,
23 they have to come forward with concrete evidence under *WAIT*
24 *Radio*, concrete evidence that they're entitled to a waiver,
25 they came forward with none, they came forward with no

1 evidence, hypothetical about maybe they'd be confused, it's
2 not a basis for a waiver, that's what the FCC is saying,
3 they're allowed to say hypothetically someone could have
4 been confused, therefore we're going to give a waiver, not
5 one of them brought forth any evidence, and we pointed it
6 out in our responsive comments, and you know what they said
7 on reply, we don't have to come forward with evidence that
8 we were confused. It's enough that there's sort of this
9 ether in the air that we're confused, that's ludicrous, I
10 mean, it just doesn't pass the high burden that a Defendant
11 has to, that a person has to show to get a waiver from an
12 effective regulation.

13 This Court has said that if the text of an order
14 isn't consistent with a footnote you go by the text. This
15 Court has also said that if the report itself is
16 inconsistent with the plain language of the regulation you
17 go by the regulation. If they want to make some due process
18 claim that, some due process claim which they haven't, that
19 somehow it's void for vagueness --

20 JUDGE KAVANAUGH: But that's certainly the
21 backdrop to this is that it's a violation of fair notice,
22 due process to set out two different prohibitions that are
23 inconsistent with one another, or an express permission
24 carve out from a prohibition, it's unfair then to impose
25 liability on someone, that's certainly what, and that

1 constitutes good cause.

2 MR. BRILL: Well, they don't say due process,
3 number one.

4 JUDGE KAVANAUGH: No, I know, I understand that.

5 MR. BRILL: They never make that argument. Number
6 two, if that's the position the Court's going to take then
7 it's abrogating all the other cases that say when there's an
8 inconsistent footnote with a text you go by the text; or
9 when there's an inconsistent text with a plain language of
10 the regulation you go by the regulation. Again, Your Honor,
11 not a single one of them ever asserted they were confused by
12 it, that is what is required by *WAIT Radio*. The Agency
13 can't just make a random determination to say well, gee,
14 we're going to grant waivers because we think there might
15 have been confusion, the people have to come forward and say
16 they were confused, they have to come forward and give
17 evidence that they were confused. They provided nothing,
18 and therefore they don't satisfy *WAIT Radio* under that.

19 Number two, they also don't satisfy based on the
20 particular facts of the waiver, based on the particular
21 facts of the waivers in the public interest because the
22 public's interest in this statute is to make sure this
23 regulation and the statute is to make sure that people are
24 getting faxes they don't want to get anymore don't get them.
25 And the public interest is reflected by the TCPA as if

1 there's a private right of action to bring for violation of
2 that regulation. All the FCC said was well, there was, the
3 public interest is that there was confusion, which is not a
4 public interest, and they said that, you know, and they said
5 there may be significant liability, but that's a private
6 interest of the parties, and they even admitted that
7 liability in and of itself is not enough.

8 And finally -- I'm sorry.

9 JUDGE KAVANAUGH: I was going to cut you off, but
10 go ahead.

11 MR. BRILL: The final thing --

12 JUDGE KAVANAUGH: I'll give you a minute.

13 MR. BRILL: -- Your Honor, is that --

14 JUDGE KAVANAUGH: Try to wrap it up if you can,
15 so --

16 MR. BRILL: I will. They did not articulate a
17 relevant standard for when they were or were not going to
18 give a waiver, they just said people similarly situated,
19 which by the way is everybody because their determination is
20 not based on individual claims by individuals, but rather a
21 general ethereal notion of confusion.

22 JUDGE RANDOLPH: So, it's sort of like a class
23 action?

24 MR. BRILL: Well, no, because in the class action
25 you have to actually show proof that there was damage. Here

1 there's no causative connection whatsoever, they don't come
2 forward with it, and in fact, the Commission's bureau later
3 on has granted waivers, it's not in the record, but they
4 said you don't need to bring proof that you were confused,
5 it's just enough that there was sort of an aura of
6 confusion, and that is not sufficient under *WAIT Radio*.

7 JUDGE KAVANAUGH: Okay. We'll give you some time
8 on rebuttal.

9 MR. BRILL: Thank you.

10 JUDGE KAVANAUGH: Thank you very much.

11 ORAL ARGUMENT OF MATTHEW J. DUNNE, ESQ.

12 ON BEHALF OF THE RESPONDENTS FCC, ET AL.

13 MR. DUNNE: Good morning, again, Your Honors.
14 Matthew Dunne for the FCC. So, I would start by reiterating
15 something I said earlier, that Congress in setting out the
16 statute made a finding that it was balancing individual
17 privacy interests and commercial freedoms of trade, so
18 clearly Congress was worried about the tension between
19 these. The Agency was doing something similar in this
20 order, it decided to keep the order prospectively, but it
21 also had a mess of its own making, the Agency had set out an
22 order which flatly contradicted itself and the regulation at
23 issue.

24 JUDGE PILLARD: I really don't understand the
25 position. The order is nowhere contradictory.

1 MR. DUNNE: Well, the order has a footnote which
2 says -- sorry. Here I'm speaking --

3 JUDGE PILLARD: I mean, the regulation itself.

4 MR. DUNNE: Right. I mean to say that the order
5 contradicts the regulation. Right. So, it's true that I
6 think the Agency assumes as it must that regulated parties
7 read its orders. It's true as a statement of the law that
8 the C.F.R. would control over an order, but that doesn't
9 mean a reasonable party might not be confused.

10 JUDGE PILLARD: And no requirement of proof of
11 actual confusion?

12 MR. DUNNE: Well, that depends on what you mean by
13 proof of confusion. So, here the Agency --

14 JUDGE PILLARD: Something showing that they
15 actually were confused.

16 MR. DUNNE: Well, sorry. So, I guess I mean how
17 specific that has to be. So, the Agency set a presumption
18 that parties were confused given the flatly confusing and
19 contradictory order that it issued, but it remained open to
20 prove to the contrary. So, it's sort of ordering proof in
21 its own, you know, setting --

22 JUDGE PILLARD: And who would prove that, who
23 would prove the negative?

24 MR. DUNNE: Well, there's, as Your Honors are
25 aware, a motivated class action bar that wants to prove that

1 these parties were in fact not confused, and in fact, in
2 some cases, for example, discovery has gone forward and they
3 would have evidence about what people knew and when and, and
4 maybe a party has made public statements, for example, that
5 would belie any confusion.

6 I guess I would say that the FCC was in a somewhat
7 unenviable position of having to clean up its own mess, but
8 again, it was a mess of the Agency's own making, and it
9 decided today, or rather in 2014 the best thing to do was to
10 grant the waivers that had been applied for because the
11 parties reasonably may have been confused.

12 JUDGE KAVANAUGH: You want to distinguish the *NRDC*
13 case, because that was --

14 MR. DUNNE: Yes.

15 JUDGE KAVANAUGH: -- one raised --

16 MR. DUNNE: Thank you.

17 JUDGE KAVANAUGH: -- from Mr. Bellin.

18 MR. DUNNE: So, as Your Honors I think are
19 probably more familiar with it, especially some of you than
20 even we are, but as I read that case I would distinguish it
21 on two grounds, one is in *NRDC* the Agency purported to use
22 its affirmative rule-making power to create an affirmative
23 defense to be used in a case. It wasn't exercising any of
24 its normal rule-making, or administrative powers, it was
25 creating a brand new affirmative defense that had, it

1 claimed had to be respected by a District Court.

2 And the second, and the second point in the wing,
3 which it's different, I think, is the Agency was also, as I
4 read the case, and again, you would know better, sort of
5 trying to pull a fast one. So, it had previously tried to
6 excuse certain kinds of pollution by rule-making power, this
7 Court said the statute prohibits that kind of excuse, so
8 there was a statutory limit on pollution, and the Agency,
9 and a second bite of the apple said well, okay, there's an
10 affirmative defense if you reasonably polluted but couldn't
11 have prevented it. So, the Agency was clearly trying to
12 circumvent an express statutory requirement about pollution
13 limits. And I read that as an important subtext of what's
14 going on in the order. Here by contrast the violation
15 complained of is the Agency's own rule, and it's not set out
16 in the statute.

17 JUDGE PILLARD: But Mr. Dunne, you in the, in
18 beginning your remarks you said that the statute and the
19 Agency was trying to balance these interests permitting
20 solicited faxes and stopping unsolicited faxes, and Congress
21 created this cause of action, and the minimum \$500 damage
22 amount, and yet, when the Agency was considering the public
23 interest in its assessment of whether waiver was appropriate
24 why, I didn't see anywhere that the Agency considered the
25 reliance of Plaintiffs and the costs that they had invested

1 in enforcing this legislation under Congress' enactment, and
2 wondered why that isn't taken into account in this statute,
3 which is about nuisance faxes?

4 MR. DUNNE: Right. Your point is well taken, Your
5 Honor. I think if I have a correctly marked up copy of the
6 order that I can find it quickly. If not, I can find it for
7 you and submit it later. But there is a citation in the
8 order that the Commission does specifically take note,
9 obviously, that Congress intended to, there's a disincentive
10 effect, of course, with preventing unsolicited faxes, and
11 also recompensing parties that have received unsolicited
12 faxes, the Agency explicitly acknowledges those interests
13 and says in this case given I think it's sort of a
14 multiplication equation you have, a problem of the Agency's
15 own making, and a very large liability, neither of which
16 separately might suffice, but combined the Agency found that
17 that interest outweighed the interest on the other side of
18 the ledger for the public interest. It also pointed out, of
19 course, that because the rule is retained prospectively that
20 it will continue to allow parties to opt-out of future
21 unsolicited faxes, so there's the benefit of that. In a
22 prophylactic rule like this, of course, looking backward a
23 waiver, there's no prophylactic effect in the past.

24 JUDGE PILLARD: But the concern I guess is it went
25 years on the books before the waiver authority was

1 exercised, and so there are parties going forward who would
2 not have invested the time, and if the clarification came
3 earlier, if the clarification had been sought earlier the
4 end orders, or the end of petition was not even seeking
5 clarification on this point, it was seeking clarification of
6 the authority as I recall. And so, it just, it seems a
7 little curious for the Agency to believe that there was such
8 a mess for it to clean up when it had not seemed to trip
9 anybody up, and it had been very much relied on by the
10 individuals who are, the businesses that are supposed to be
11 protected from those.

12 MR. DUNNE: Right. There's certainly no dispute
13 we would have been in a lot better situation if someone had
14 sought a declaratory ruling much earlier, and it did I
15 believe in 2010 if I have the dates correct, so even though
16 this order came out in 2014 the gap is not, is about half of
17 what it might look like initially. So, I think there's no
18 doubt that would have been a lot better, but I think the
19 question is did the Agency abuse its discretion in 2014
20 dealing with the mess as it was presented at that time?

21 JUDGE KAVANAUGH: But is it, Mr. Bellin talks
22 about this, is it really the Agency's authority to
23 extinguish a cause of action based on what the law was at
24 the time? In other words, for the FCC to retroactively in
25 essence rewrite the regulation when the District Court,

1 trial courts in question could all interpret what the law
2 was at that time, and figure out for themselves whether this
3 argument was a sufficient offense for the Defendants?

4 MR. DUNNE: Right. I think the reason the answer
5 is -- so, yes, and it's because the cause of action is
6 predicated on the violation of the Agency's rules, the
7 Agency clearly has authority to waive its own rules, so
8 Congress set up a regime --

9 JUDGE KAVANAUGH: Certainly going forward, but to
10 retroactively rewrite the rule and give that retroactive
11 effect, and thereby extinguish a cause of action is
12 something that, a step beyond, I'm not saying it's
13 impermissible step beyond --

14 MR. DUNNE: Right.

15 JUDGE KAVANAUGH: -- but it's a step beyond the
16 usual waiver which is just a waiver going forward?

17 MR. DUNNE: I think that's right. I think there,
18 but there are other actions the Agency could take that would
19 have retroactive effect, for example, if the Agency were to
20 rule today it turns out we didn't have authority, those
21 causes of action would then be void. Or if it were to say
22 now that we've looked at it it doesn't effect this category
23 of fax, maybe the first solicited fax, or whatever category.
24 I think the District Court would respect that much along the
25 lines of these primary jurisdiction cases.

1 JUDGE KAVANAUGH: But the regulations are what the
2 regulations were, I mean, I just don't know that --

3 MR. DUNNE: I just --

4 JUDGE KAVANAUGH: -- in terms of the statutory,
5 the statutory cause of action is predicated on what the
6 regulations were.

7 MR. DUNNE: But I was just making maybe a more
8 modest point that the Agency may take action today, which
9 retroactively has effect on what the regulations were at
10 that time.

11 JUDGE PILLARD: But it's certainly more, I would
12 think that they would have a higher hurdle where it's not
13 just, I mean, applying to pending cases typically it's
14 something that then in the pending case could be taken an
15 account of, and that's why it's not really retroactive in
16 the kind of uprooting settled expectation sense. Whereas,
17 here it really is uprooting settled expectations, and so
18 you're saying well, the Agency was falling all over itself
19 to correct its error, but it seems like it's got a couple of
20 errors here, one was the ambiguity planted in the footnote,
21 but the other was that it's got a whole bunch of people out
22 there trying to enforce rights that they believe that had.
23 So, it makes a different mess to say oh, actually, never
24 mind.

25 MR. DUNNE: I think there is no step the Agency

1 could have taken that would not have had a downside, I agree
2 with that. But here I think the question is what has the
3 Agency had to exercise its, you know, balancing, and its
4 discretions aside, given these bad options which is the
5 best, and is it fair to impose an affirmative liability on a
6 party as opposed to --

7 JUDGE KAVANAUGH: But couldn't the courts address
8 that question?

9 JUDGE PILLARD: In the cases?

10 JUDGE KAVANAUGH: In the cases?

11 MR. DUNNE: Well, they could, Your Honor, that's
12 right. The Agency is doing whatever it can today, or the
13 Agency did whatever it can today in 2014.

14 JUDGE KAVANAUGH: Suppose there had been no
15 confusion in the 2006 --

16 MR. DUNNE: Okay.

17 JUDGE KAVANAUGH: -- 2005 era regulations, and
18 order, and what have you, but the FCC now just said, you
19 know, that was a bad order, a bad rule --

20 MR. DUNNE: Right.

21 JUDGE KAVANAUGH: -- a bad regulation we're
22 waiving, we're withdrawing it and retroactively altering it,
23 put aside the legal niceties of this, but that's the basic
24 story --

25 MR. DUNNE: Right.

1 JUDGE KAVANAUGH: -- of what they're doing, could
2 they, could the FCC do that and thereby extinguish the cause
3 of action?

4 MR. DUNNE: When you say bad you mean just a
5 policy --

6 JUDGE KAVANAUGH: Yes.

7 MR. DUNNE: -- we wish we hadn't made that rule?

8 JUDGE KAVANAUGH: Yes.

9 MR. DUNNE: I don't think so. I think -- well,
10 and I don't know what the procedural mechanism would be if
11 it tried to exercise a waiver as it has here.

12 JUDGE KAVANAUGH: What I'm trying to tease out is
13 how important is the confusion to your argument?

14 MR. DUNNE: Well, it has, there has to be a
15 procedural mechanism to, for the Agency to act, and here the
16 waiver is predicated on that confusion.

17 JUDGE KAVANAUGH: Yes. The good cause is
18 predicated on the --

19 MR. DUNNE: That's right, and if the, the Agency
20 explicitly said just a lot of liability wouldn't be enough
21 for good cause.

22 JUDGE KAVANAUGH: Yes.

23 JUDGE PILLARD: And good cause is a really special
24 circumstances, but here it's the whole watermelon.

25 MR. DUNNE: Well, it's special to this regulation,

1 that is to say it's a particular set of facts which lead to
2 this confusion, so it's not saying, for example, trying to
3 wipe out all of TCPA liability for a specific set of
4 violations in which based on an order that was confusing.
5 So, it's specific to those regulation, and the Agency's own
6 wrongdoing or failure.

7 JUDGE KAVANAUGH: Don't you think if you were
8 Counsel for a regulated entity you would have said we better
9 put the opt-out notice on everything because that's what's
10 in the text of the regulation?

11 MR. DUNNE: I do, Your Honor. Again, I don't
12 think there's a question that the correct reading of the law
13 is that the C.F.R. would control, and we, too, wish someone
14 had sought clarification even earlier, but I think the
15 question for this Court is did the Agency abuse its
16 discretion in 2014 in granting this waiver?

17 JUDGE PILLARD: And indeed, that's been the FCC's
18 position all along is that it's always been clear?

19 MR. DUNNE: Well --

20 JUDGE PILLARD: That was your position in the --

21 MR. DUNNE: -- it's always been clear --

22 JUDGE PILLARD: -- Anda Order, and, right? That's
23 been your position?

24 MR. DUNNE: Yes, I think it's clear, that is to
25 say it's a correct statement of the law that the rule

1 controls, yes, so the Agency wouldn't dispute that. But it
2 also found basis for reasonable confusion in the order.

3 JUDGE KAVANAUGH: Okay.

4 MR. DUNNE: Thank you, Your Honors.

5 JUDGE KAVANAUGH: Thank you. I think we have Mr.
6 Long? Yes, there he is.

7 ORAL ARGUMENT OF ROBERT A. LONG, ESQ.

8 ON BEHALF OF THE WAIVERS INTERVENORS

9 MR. LONG: Thank you, Your Honors, may it please
10 the Court, Robert Long representing the Intervenor in
11 support of the FCC on the waiver issues.

12 I think really Congress started this conundrum by
13 saying that the private right of action is linked in part to
14 violations of the FCC's regulations, and when it said that
15 it didn't expressly change the Agency's usual authority to
16 interpret its own regulations, or we think to grant a waiver
17 of its regulations for good cause, I mean, that's really the
18 question I think on this part of the case of, you know, I
19 think ultimately there's no dispute that the FCC can grant
20 waivers to its rules, they can have retroactive effect,
21 there's even a statement on page five of the reply brief
22 that Petitioners are challenging the FCC's ability to
23 retroactively or prospectively waive any of its regulations
24 on an administrative level. So, I think one way to think
25 about this is look, okay, the FCC, you know, setting aside

1 for a minute the question about whether they had good cause
2 for a waiver, but if they had good cause they could grant a
3 waiver that would be effective on an administrative level,
4 and I think then the question is what effect if any does
5 that have on the private rights of action.

6 JUDGE KAVANAUGH: But it's a huge authority to
7 give to the Agency to have this on-off switch that applies
8 retroactively to extinguish a private cause of action when a
9 regulation might have said X and the Agency now wants to say
10 well, not X, and the party in question says well, actually,
11 it said X, and the Defendant violated the regulation as it
12 existed at the time, and --

13 MR. LONG: Well, I mean, if there weren't a
14 private right of action it's an authority that I think
15 everybody --

16 JUDGE KAVANAUGH: I agree with that.

17 MR. LONG: -- agrees --

18 JUDGE KAVANAUGH: The private right of action
19 angle is intriguing --

20 MR. LONG: Right. But, I mean, there's --

21 JUDGE KAVANAUGH: -- because you --

22 MR. LONG: But there is a safety valve, as Judge
23 Randolph was raising, if it's Congress, Congress can enact
24 retroactive legislation, it does occasionally, you know, if
25 the Agency can't be the safety valve here, unless Congress

1 steps in, you know, you could imagine situations where the
2 rule is just a mistake, it can't be done, the fax machines
3 weren't capable of doing whatever it was the Agency
4 required, and if the view we're considering now, look,
5 because this rule is linked to a private right of action,
6 once the fax is sent the Agency can't do anything, maybe it
7 can interpret its rule, maybe that, because although --

8 JUDGE KAVANAUGH: But presumably there'd be some
9 kind of defense in a situation like that in the court suits,
10 and so to here you could say well, the core suits you could
11 say that regulation, we didn't really violate it because
12 look at the confusion that existed, and maybe that would
13 work, and maybe it wouldn't, but the idea that the FCC, I
14 think this is the argument, and it seems different from the
15 usual situation --

16 MR. LONG: Well, this --

17 JUDGE KAVANAUGH: -- I think you're acknowledging
18 it's different, I think.

19 MR. LONG: -- this is an unusual situation, I will
20 not --

21 JUDGE KAVANAUGH: It's an unusual statute, I
22 suppose, to have it --

23 MR. LONG: But I will say, Your Honor, when you
24 raise --

25 JUDGE KAVANAUGH: -- this provision.

1 MR. LONG: It is unusual. When you raise due
2 process I do think, you know, it's not simply that there are
3 directly contradictory statements in the order, it's also
4 that the notice of proposed rule-making didn't say anything
5 about regulating solicited faxes, when you actually look
6 at --

7 JUDGE KAVANAUGH: Well, yes, that, you know, that
8 happens all the time where the Agency goes well beyond the
9 notice.

10 MR. LONG: Well --

11 JUDGE KAVANAUGH: You know, a good lawyer, and
12 you're all good lawyers would read the regulations, say we
13 better not do this to your clients.

14 JUDGE PILLARD: Well, let's jump in there and get
15 some clarification, let's file something for
16 reconsideration. Do they really mean this? It seems like
17 they're speaking out of both sides of their mouths. Here's
18 the authoritative text, but gee, you know, are we missing
19 something, and go in to, I mean, years --

20 MR. LONG: But again, the --

21 JUDGE PILLARD: -- go by.

22 MR. LONG: -- the, when you read the final rule
23 there is one sentence, one sentence, it's not even --

24 JUDGE PILLARD: Yes.

25 MR. LONG: -- got its own, I mean, you have to be

1 reading each sentence very carefully --

2 JUDGE PILLARD: You do. You do.

3 MR. LONG: -- to see the --

4 JUDGE KAVANAUGH: Well, that's true. That's a
5 good idea.

6 MR. LONG: It's truly, it's truly --

7 JUDGE KAVANAUGH: Yes.

8 MR. LONG: -- elephants and mouse holes, there's a
9 directly contradictory footnote, and as we said, I mean,
10 even the rule, the language that introduces that section of
11 the rules --

12 JUDGE RANDOLPH: In addition, and the FCC has not
13 made this argument --

14 MR. LONG: They have not made that argument.

15 JUDGE RANDOLPH: -- but if one reads the statute
16 first you'd never come out with the idea that --

17 MR. LONG: Of course.

18 JUDGE RANDOLPH: -- a solicited fax requires --

19 MR. LONG: Of course.

20 JUDGE RANDOLPH: -- an opt-out notice.

21 MR. LONG: But -- yes. And what I was leading up
22 to --

23 JUDGE RANDOLPH: The FCC has not made that
24 argument, you know.

25 MR. LONG: I mean, it's --

1 JUDGE PILLARD: But --

2 JUDGE KAVANAUGH: That goes to the first part of
3 the, I mean, the case today.

4 JUDGE PILLARD: But Mr. Long, assuming that they
5 do have this authority what about the question of whether
6 there's good cause here? Special circumstances, and a
7 public interest?

8 MR. LONG: Well, I mean, I, our position would be
9 that they need to show what they ordinarily would need to
10 show to grant a waiver, that is good cause, special
11 circumstances, and that the public interest favors it, and
12 there's a debate about that. We think that's, you know,
13 that's an abuse of discretion standard that gets applied,
14 which maybe again raises your questions about this is too
15 breathtaking an authority to give to the Agency, but I think
16 it's, you know, what the Agency ended up saying was there
17 was confusion or misplaced confidence that the rule didn't
18 apply, and I would submit that even careful lawyers when you
19 read this you could come away with misplaced confidence that
20 all of this stuff is regulating unsolicited faxes, and --

21 JUDGE PILLARD: I believe they even gave the
22 waiver to entities that said oh, we just didn't know. Just
23 total ignorance of the standard. Not confusion, not even
24 aware that there's an obligation, but they get the waiver
25 also. Good cause? It's a little tough.

1 MR. LONG: So, I'm sorry, would you --

2 JUDGE PILLARD: That some of the entities that get
3 benefited from the waiver didn't claim confusion, they
4 claimed they just were unaware that there was a requirement
5 that they put an opt-out notice --

6 MR. LONG: Well, I mean --

7 JUDGE PILLARD: -- they're just unaware.

8 MR. LONG: -- you know, that's the argument that
9 everybody should have to put in affidavits, and I think at
10 that level, I mean, I'm assuming perhaps against all
11 evidence that we've gotten over the concern about even
12 giving the FCC this authority, but once we decide, you
13 decide yes, they do have this authority I think the Agency
14 has to have quite a lot of discretion to say look, this is
15 confusing on its face, this is giving misplaced confidence
16 that it only applies to unsolicited faxes on its face, we
17 are not going to require each individual applicant to swear
18 an affidavit, you know, they did say in the order. Now, if
19 you just say we were ignorant of the law, we didn't read
20 this thing at all, we didn't even try to figure out what,
21 then you don't get a waiver. So, I think that's a standard,
22 I think it's within the FCC's discretion on --

23 JUDGE RANDOLPH: Do you know whether --

24 MR. LONG: -- what evidence is needed. So, I
25 think if you get to that stage, you know, this would be

1 within the Agency's fairly broad discretion to grant a
2 waiver.

3 JUDGE RANDOLPH: Do you know whether in any of the
4 pending class actions the Defendants have raised, had raised
5 the point about the footnote, and the ambiguity of the order
6 versus the regulation?

7 MR. LONG: I don't know the answer to that
8 question, but I think it's certainly possible that that,
9 that you could get that sort of wires crossed kind of
10 situation coming up. I mean, the permission does have to be
11 express and prior, so it has to be given prior to the fax
12 being sent.

13 JUDGE RANDOLPH: And what is your position, if we
14 rule in favor of your argument, and in favor of the FCC's
15 with respect to waiver is that binding on all of the
16 District Courts where these cases are pending?

17 MR. LONG: My thought on that is that this Court
18 could simply say we think that the FCC had authority to
19 grant a waiver, and we think the waiver is valid. And you
20 could if you want to stop there and it would be up to the
21 courts in the class actions to say, I mean, I think it's, at
22 that point it's a fairly short argument, you say look, if
23 there's a valid waiver that means where the waiver applies
24 was not a violation of the regulation during this time
25 period, and that means there can't be a valid cause of

1 action for --

2 JUDGE RANDOLPH: A district judge in Connecticut
3 could say I don't agree, right?

4 MR. LONG: Well, I mean, I think if the district
5 judge said that, the district judge would be wrong, and if
6 you're prepared to go ahead and take --

7 JUDGE KAVANAUGH: But that's not going to stop the
8 district judge in Connecticut just for saying that, I mean,
9 the point is that could happen, right? In fact, all the
10 district judges or trial judges could disagree with anything
11 we say on a waiver, right?

12 JUDGE RANDOLPH: Except those in D.C.

13 JUDGE KAVANAUGH: Except in D.C.

14 MR. LONG: I think that is a way you can resolve
15 this case, I don't think it's necessary for you to instruct
16 all the District Courts all over the country --

17 JUDGE KAVANAUGH: I don't know that we can. Yes.

18 MR. LONG: Well, and yes, whether you can or can't
19 I don't think you have to.

20 JUDGE KAVANAUGH: On the due process point, the
21 reason this is tricky I think if an agency retroactively
22 waives a rule it was enforcing, and then the due process is
23 all on one side arguably, but here it's retroactively
24 altering a private right of action, so you arguably have
25 interests, private interests on both sides, and that's why

1 this is a --

2 MR. LONG: Right.

3 JUDGE KAVANAUGH: -- trickier circumstance --

4 MR. LONG: Tricky.

5 JUDGE KAVANAUGH: -- it seems to me.

6 MR. LONG: And in answer to that question, though,
7 I mean, I do think, well yes, that the Plaintiffs, or maybe
8 more accurately the Plaintiff's lawyers have been putting
9 resources into litigating these cases, I mean, they could
10 read exactly the same thing, they could see wow, there's
11 this contradictory statement in the order, this is not very
12 clear, it's been hotly contested all along. So, I mean, I
13 think the, yes, they've been, you know, putting resources
14 into this, but I would say their reliance is not fully
15 justified because there has been this sort of question.

16 JUDGE RANDOLPH: Do you whether, do we have
17 exclusive jurisdiction to review FCC regulations under this
18 statute?

19 MR. LONG: I don't think so, Your Honor, but I
20 don't know the answer to that question as I stand here.

21 JUDGE RANDOLPH: Yes, we'll look at that. We used
22 to, I don't know whether we still do have exclusive
23 jurisdiction to review licensing decisions. Much to the
24 glee --

25 MR. LONG: I will --

1 JUDGE RANDOLPH: -- of the other circuits.

2 MR. LONG: -- check that, and if my, what I think
3 is the answer turns out to be wrong I will submit a letter,
4 do whatever is appropriate to get that information to the
5 Court.

6 JUDGE KAVANAUGH: Okay. Thank you very much, Mr.
7 Long.

8 MR. LONG: Thank you.

9 JUDGE KAVANAUGH: Mr. Bellin, we'll give you two
10 minutes for rebuttal.

11 ORAL ARGUMENT OF AY TAN Y. BELLIN, ESQ.

12 ON BEHALF OF THE PETITIONERS YASKOV, ET AL.

13 MR. BELLIN: Thank you. Just on the
14 jurisdictional question, Your Honor, this is a Hobbs Act
15 case, so the appeal could be from the, what would happen is
16 you have to go through the Agency, and then you can go to
17 Circuit Court of Appeals, either the D.C. Circuit, or one
18 where I believe that the Petitioner is from, and I think
19 either one, in this case it was a raffle because it was
20 between the Eighth Circuit and here, and the D.C. Circuit,
21 you won the privilege to have this case, Your Honor, I'm
22 sorry to say.

23 JUDGE RANDOLPH: Lucky us.

24 MR. BELLIN: I want to point out something,
25 correct Mr. Long, which I'm sure was inadvertent, there is

1 nothing in the order that says ignorance of the TCPA you
2 don't get a waiver. That's something that the Bureau seems
3 to have created later on that's not in the record here, in
4 fact, in one of my own cases the Amicus mediation case, if
5 you look at the comments, in depositions there they said
6 they didn't know about the TCPA, and they got a waiver
7 anyway. So, that's not what the rule is.

8 Number two, the extent of -- I've got to tell you
9 honestly, I didn't see that footnote, Your Honor, and I
10 don't think anybody else did either. So, to say that we
11 were relying on something that we should have relied on we
12 relied on case law that says that if the regulation is clear
13 it's got to be enforced. And even if I had seen the
14 footnote I would have relied on the cases of this Court that
15 say gee, footnote is inconsistent with the text of the
16 order, you go by the order; and I would have also relied on
17 the decisions of this Court that say if the regulation is
18 clear then even if the order is unclear you go by the
19 regulation. I mean, the notion that a lawyer who looked at
20 this, with that clear case law out there would be confused
21 as to what's to be done, is really, it's really
22 unimaginable, Your Honor.

23 In any event, this is a separation of power, there
24 is no proof that *WAIT Radio* and *Northeast Cellular* said that
25 petitioners for a waiver have a heavy burden, they haven't

1 satisfied this here, the FCC is not allowed to assume
2 anything, they're not allowed to assume confusion, this is
3 not a big burden, write an affidavit that says we looked at
4 this, we saw the regulation, we had a meeting, we said gee,
5 we don't know what this means, therefore let's put it on
6 there. Let them put that in, how hard is that to do?
7 That's not some huge administrative burden, and that's
8 something that the FCC could have reviewed and we could have
9 challenged. By the way, in waiver applications, Your Honor,
10 we have no, the persons opposing the waiver don't have an
11 opportunity for discovery, he says well, you know, you can
12 just, you know, during discovery you can find out whether
13 they knew it or not, a lot of these cases there hasn't been
14 discovery, and there's no way, I think there are even some
15 cases that seem to indicate that you can't get discovery and
16 waiver petitions in front of the FCC.

17 JUDGE PILLARD: Well, a lot of it's going to be
18 attorney-client privilege, I mean, who's telling you what to
19 put on, and what not to, and they're reading the law, and, I
20 mean, I don't know.

21 MR. BELLIN: If they're using that as a shield,
22 Your Honor, and saying that we were confused, they can't
23 have the same -- if they're using it as a sword and saying
24 they were confused, then the case law is clear, they can't
25 use it as a shield and say by the way, you can't ask us, I

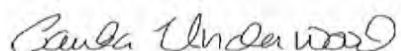
1 mean, they can't have it both ways. So, in fact, they have
2 to come forward with the evidence, *WAIT Radio* is clear on
3 that, and so are the other cases, and we submit, Your Honor,
4 that under these circumstances the FCC did not have the
5 power to do what it did, it was only the courts have the
6 power, and that they haven't satisfied the standards for a
7 waiver. Thank you, Your Honor.

8 JUDGE KAVANAUGH: Thank you very much. The case
9 is submitted.

10 (Whereupon, at 12:04 p.m., the proceedings were
11 concluded.)
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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

November 10, 2016

DEPOSITION SERVICES, INC.